No. 127.

Brf. of Atty. Gen

for

U. S.

Filed Oct. 3, 1898.

Office Supreme Court, U. S.
FILED
OCT 3 1898
JAMES H. MCKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1898

THE UNITED STATES, PLAINTIFF in error,
v.
WALTER S. HARSHA, DEFENDANT in error.

No. ~~491~~ 127.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFF in error,
v.
WALTER S. HARSHA.
} No. 401.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error, Walter S. Harsha, was duly appointed and qualified as clerk of the circuit court of appeals for the sixth circuit on June 16, 1891, which office he continued to fill until October 2, 1894, when his resignation was accepted, he receiving for his services during the said period the statutory salary of $3,000 per annum.

At the time of his appointment as such clerk of the circuit court of appeals, and long prior thereto, he was occupying the office of clerk of the circuit court of the United States for the eastern district of Michigan, being a permanent resident of the city of Detroit, and continued to act as such clerk of the circuit court with the assent

and approval of such court up to May 24, 1897, the date of the certification of the case to this court.

On July 31, 1894, Congress passed an act (2 Supp. R. S., 212, sec. 2) prohibiting any person holding an office, the salary or annual compensation of which was $2,500 per annum, from holding any other office.

The accounts of said Harsha for services as clerk of the circuit court of the United States for the eastern district of Michigan for the first quarter of the calendar year 1895, amounting to $482.90, were made, presented, approved, and allowed by the circuit court of the United States as provided by law, and were duly forwarded to the Attorney-General for examination as provided by the statute; but upon presentation at the Treasury Department of the said accounts so forwarded to the Attorney-General, the Comptroller of the Treasury contended that a vacancy occurred in the office of said clerk of the circuit court of the United States, beginning August 1, 1894, by reason of the act of July 31, 1894, *supra*, as after that date Harsha continued to hold the office and to receive the salary of clerk of the circuit court of appeals for the sixth circuit, the annual compensation of which office was $3,000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895; and upon the grounds of such vacancy disallowed the accounts of petitioner as clerk of the circuit court of the United States for the district of Michigan for the said first quarter.

Thereupon suit was brought by said Harsha under the act of March 3, 1887 (1 Supp. R. S., 559), entitled "An

act to provide for the bringing of suits against the Government of the United States," to recover the sum of $482.90, being the fees earned by him as clerk of the circuit court of the United States for the eastern district of Michigan for the first quarter of the calendar year 1895. The district court, after making a finding of facts and stating its conclusions of law, entered a judgment for the petitioner in the sum of $482.90. From this judgment a writ of error was sued out by the Government from the circuit court of appeals, which writ was duly allowed and issued.

Upon the foregoing statement of facts the three questions hereinafter respectively set forth were certified by said circuit court of appeals for the instruction of this court thereon.

ARGUMENT.

FIRST QUESTION.

> Can such a judgment, rendered under the act of March 3, 1887, in the circuit or district court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

The practice obtaining for the review of judgments of the circuit and district courts under the act of March 3, 1887 (1 Supp. R. S., 559), was uniformly that of appeal from the creation of this jurisdiction in the circuit and district courts over claims against the Government until the decision of this court in the case of *Chase* v. *The United States* (155 U. S., 489).

Section 9 of the act of March 3, 1887, *supra*, which gave to the parties suing in the circuit and district courts "the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made," was held by this court in *United States* v. *Davis* (131 U. S., 36, 39) to mean "the right of appeal reserved in the statutes relating to the Court of Claims, and as that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States under said act."

In view of the foregoing decision, and because *all* judgments of the Court of Claims are taken to the Supreme Court by appeal, whenever it was deemed necessary by the Government to have the judgments of the circuit and district courts reviewed in claims cases the procedure was by appeal, and jurisdiction was uniformly taken therein by the circuit courts of appeals and by this court until the decision of the circuit court of appeals for the fourth circuit in the case of *United States* v. *Fletcher* (60 Fed. Rep., 53), where an appeal was dismissed on the ground that the method of review should have been by writ of error.

Somewhat later the case of *Chase* v. *United States* (*supra*) was decided by this court, wherein it was held that the position of the Government that cases under this act should be brought to the reviewing court by *appeal only* was not well founded. In consequence of this decision a writ of error was sued out from the circuit court

of appeals for the purpose of having the judgment in the case at bar reviewed.

It is respectfully submitted that in view of the Chase Case, which has been followed in *United States* v. *King* (164 U. S., 703), the first question presented by the circuit court of appeals should be answered in the affirmative.

SECOND QUESTION.

> Did the act of July 31, 1894, above referred to, *ex propri vigore*, create a vacancy in the office of clerk of the circuit court for the eastern district of Michigan by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals of the sixth circuit?

The act of July 31, 1894, section 2 (2 Supp. R. S., 212), provides that—

> No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

It will be observed that the act states that no person who holds an office the compensation of which amounts to the sum of $2,500 shall hold any other office. The language is clear and unequivocal. The only persons excepted from this mandatory provision are the retired

officers of the Army and Navy. No one else can by any reasonable inference be included within this exception, and if it had been the purpose of Congress to except clerks of the circuit and district courts and of the circuit courts of appeals from this inhibition it would have been easy to have said so in express terms.

It seems clear that the familiar maxim of *expressio unius exclusio alterius* applies here with full force, and that the exceptions must necessarily be limited to those specified, viz, retired officers of the Army and Navy.

Any doubt that may have existed as to the power of Congress to enlarge, limit, and repeal the authorities of public officers was settled early in the history of this country. In the famous *Dartmouth College Case* (4 Wheat., 518, 693), Chief Justice Marshall said:

> It is admitted, that the State legislatures have power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract that they shall always during their continuance in office exercise such authorities. They are to exercise them only during the good pleasure of the legislature.

The salary of the chief justice and associate justices of the territorial courts was fixed at $3,000 by Revised Statutes, section 1879, and continued to be at that rate until March 3, 1877, when Congress appropriated for full compensation for each of said justices the sum of $2,600, which provision was continued in the subsequent acts. The chief justice of the territory of Wyoming brought

suit in the Court of Claims for the difference between the amount appropriated and the salary provided in the act of June 17, 1870. A decision was rendered in favor of the plaintiff by a divided court, which upon appeal to this court (*U. S.* v. *Fisher*, 109 U. S., 143, 145) was reversed, with directions to dismiss the petition. The court, among other things, said:

> We can not concur in this view. The act of June 17, 1870, fixing the annual salary of appellee at $3,000, was not a contract that the salary should not be reduced during his term of office. (*Butler* v. *Pennsylvania*, 10 How., 402.) Nor was there any provision of the Constitution which forbade a reduction. (*Clinton* v. *Engelbrecht*, 13 Wallace, 434.) Congress, therefore, could without the violation of any contract reduce the salary of appellee, and had the constitutional power to do so.

In the case of *Butler* v. *Pennsylvania* (10 How., 402, 415) it was contended that under the act of the legislature of the State of Pennsylvania canal commissioners appointed for a period of one year should receive a per diem of $4, and that the appointment of such commissioners under the law was a positive obligation or a contract on the part of the State to employ them for the entire period and for the stipulated amount per diem, and that a subsequent act changing the tenure and reducing the compensation was a violation of such contract and therefore an infraction of section 10 of article 1 of the constitution. The court in overruling the contention of the appellant, said:

> The selection of officers, who are nothing more than agents for the effectuating of such public purposes,

is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them after the measures which brought them into being shall have been found useless, shall have been fulfilled or shall have been abrogated, as even detrimental to the well-being of the public.

* * * * *

It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and *to create and change or discontinue the agents* designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community (p. 438).

* * * * *

We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled and are called upon to foster and promote the general good; functions, therefore, which governments can not be presumed to have surrendered, if indeed they can, under any circumstances, be justified in surrendering them.

In line with the foregoing is the case of *Newton* v. *Commissioners* (100 U. S., 548, 559), wherein certain terms

and conditions required to be performed by the authorities of Canfield, Ohio, under the act of February 16, 1846, in order that the county seat should be "permanently established" at that town were carried out and the county seat established accordingly. Subsequently the legislature provided for the removal of the county seat to Youngstown, and proceedings were instituted to enjoin the same upon the ground that what had been done under the earlier act constituted an executed contract which bound the State, and the steps taken pursuant to the latter act impaired the obligation of that contract, and were therefore in violation of the contract clause of the Constitution of the United States.

The court said:

> The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure *create or abolish them or modify their duties.* It may also shorten or lengthen the term or service. And it may increase or diminish the salary, or change the mode of compensation. (*Butler et al.* v. *Pennsylvania*, 10 How., 402.)
>
> The police power in the States, and that with respect to municipal corporations, and to many other things that might be named are of the same absolute character. (Cooley, Const. Lim., 232, 342; *The Regents* v. *Williams*, 4 Gill & J., 321.) In all these cases there can be no contract and no irrepealable law, because they are "governmental subjects," and hence within the category before stated.
>
> They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its

> predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil (p. 559).

The appellant in the case of *Crenshaw* v. *United States* (134 U. S., 99) was discharged from the Navy under the act of August 5, 1882 (22 Stat. L., 284), which provided that in case of a surplus of graduates, they should be discharged. Appellant contended that by accepting the appointment he became entitled to the benefits of section 1229 and article 36 of section 1624, Revised Statutes, and that such acceptance entitled him to the office for life, unless removed by sentence of a court-martial; in other words, that he had a vested interest or contract right in his office of which he could not be deprived by Congress. In deciding that the appellant had no cause of action, the court said:

> The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase. Our courts, both State and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. What-

> ever the form of the statute, the officer under it does not hold by contract. He enjoys the privilege, revocable by the sovereignty at will; and one legislature can not deprive its successor of the power of revocation (p. 108).

If this right of removal exists with reference to army and naval officers whose term is by express statute substantially made for life, it applies *a fortiori* to the case of a civil officer whose term at most is but during the grace of the court whose creature he is.

In line with the foregoing may be cited many decisions of State courts holding substantially the same views, many of which are referred to in the case of Crenshaw, *supra.;* also Throop on Public Officers, section 19.

The courts have also held that the legislature may declare an office vacant, and in so doing it would not be an abridgment of a contract in the sense of section 10 of article 1 of the Constitution. (*People* v. *Van Gaskin*, 5 Mont., 352; *Denver* v. *Hobart*, 10 Nev., 28.)

Numerous cases may be cited sustaining the proposition that where two offices are forbidden to be held at the same time by the same person, the acceptance of the second vacates the first, among which are the following:

Foltz v. *Kerlin*, 105 Ind., 221.
People v. *Nostrand*, 46 N. Y., 375.
Davenport v. *Mayor*, 67 N. Y., 456.
People v. *Brooklyn*, 77 N. Y., 503.
Stubbs v. *Lee*, 64 Me., 195.
People v. *Leonard*, 73 Cal., 230.

The continuance in office by Harsha as clerk of the circuit court of appeals and his demanding and receiving the compensation as such, had substantially the same

legal effect as if after the passage of the act of July 31, Harsha while holding the office of clerk of the circuit court had received and accepted the office of clerk of the circuit court of appeals.

It is respectfully submitted that the second question should be answered in the affirmative.

THIRD QUESTION.

> Does the general rule that officers *de facto* may not recover by suit compensation for services rendered as such apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a *bona fide* claim of title to the office when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?

A.

If the position of the Government is well taken in the discussion of the preceding question, that a vacancy occurred in the office of clerk of the circuit court for the eastern district of Michigan after the passage of the act of July 31, 1894, then it is contended, on behalf of the Government, that Harsha, having been divested of the emblems of office, he could not become reinvested without a reappointment. The mere fact of his subsequently performing the duties of the office after becoming lawfully qualified was not sufficient to restore him to his

former position without some overt act on the part of the appointing power.

It can not be disputed at this late day that one who ceases to be an officer, either by reason of a dismissal or resignation, can not be reinstated except in the manner provided by law for filling such position, and that neither the revocation of the order of removal nor the withdrawal of the acceptance of the resignation will *ipso facto* restore such officer to his former position.

Blake v. *United States*, 103 U. S., 227.
Mimmack v. *United States*, 97 U. S., 426.
Bennett v. *United States*, 19 C. Cls., 379.
12 Op. A. G., 555.

In the case of *Blake* v. *United States* (*supra*) the appellant's resignation as an officer in the Army was accepted in 1869; in 1878 he was reappointed. The President in his order of reinstatement said that as "Chaplain Blake was insane at the time he tendered his resignation, it is held that such resignation was and is void, and the acceptance thereof is set aside." The question of the right to receive pay for the period between the date of removal and the reappointment "is not decided, but is left for the decision of the court." The Supreme Court, in passing on the right of Blake to recover compensation for this period, say: "He was, consequently, not entitled to pay as post chaplain after July 2, 1870, from which day his successor took rank. Having ceased to be an officer in the Army, he could not again become post chaplain except upon a new appointment, by and with the advice and consent of the Senate."

In line with the Blake Case, and cited with approval therein, is the case of *Mimmack* v. *United States* (97

U. S., 426), wherein this court held that, although the President issued an order revoking his acceptance of the resignation of an army officer, such revocation did not operate to restore such officer to the service, and that he could not recover compensation for the period after such revocation (p. 438).

In the case of *Bennett* v. *United States* (19 C. Cls. R., 379) the court held, on the authority of the Mimmack Case, that a valid and unconditional acceptance of a resignation, accompanied by a proper notification, operated to remove an officer from the military service, and nothing short of a new appointment could effect a restoration. The same court, in the case of *Palen* v. *United States* (19 C. Cls. R., 389), say where an order had been made mustering an officer out of the Army the President is without power to revoke such order of dismissal or restore the officer except upon the advice and consent of the Senate.

State courts have held, in line with these decisions, that the unqualified resignation of an officer, which has been received by the proper authorities, becomes complete and effectual, and can not be recalled and the office resumed by such officer without a reappointment.

State ex rel. William B. Fitts, 49 Ala., 402.
Bunting v. *Willis*, 27 Grat., 144.
Pace v. *People*, 50 Ill., 432.
State v. *Hauss*, 43 Ind., 105.

B.

Harsha having been divested of his office by the act of July 31, in order to reinvest him therewith something

more was required than a mere tacit understanding between himself and the court that he should continue to act as such clerk, and some action was necessary on the part of the appointing power.

In the case of *Shell* v. *Cousins et al.* (77 Va., 328, 331) a sheriff holding office under the Virginia constitution accepted a second office, although the constitution says, "sheriffs shall hold no other office." The court held:

> The record shows that the office of sampler of tobacco was actually held and afterwards upon the institution of proceedings against him actually resigned in the most formal way by a letter to the governor. * * *
>
> It was the acceptance of the incompatible office and holding the same for even so brief a space of time that forfeited the first office, and, as we have seen above, created an actual vacancy in the same without any proceedings to remove him whatever, by *quo warranto* or otherwise; and if the office was thus vacant and he absolutely out of it, he could in no manner affect the first office by what he did with the second, since resigning one office could not put a party in an office nor could it restore him to one he had actually vacated. And if the office of sheriff was vacant it was the duty of the judge under the law to fill such vacancy in the mode prescribed by law.

This decision was in line with *Commonwealth* v. *Sherrard* (4 Leigh, 643), wherein the court held that the acceptance of the office of postmaster by a person holding the office of justice of the peace operated to vacate the latter office, notwithstanding the fact that he had

resigned the former before the prosecution commenced, and said further:

> It is of no consequence that the defendant had resigned that office before this prosecution was commenced, for by the acceptance of it his commission as a justice was absolutely vacated, and he became forever disqualified to act as such unless under the authority of a new commission.

C.

Under section 794, Revised Statutes, the clerk of a circuit court or a district court "shall, before he enters upon the execution of his office, take an oath or affirmation." This provision is mandatory and can not be waived. The claimant has persistently refused to take such oath. It is true that for his original appointment as such clerk he took the necessary oath, but can it seriously be contended than an oath of office once taken is good for any number of subsequent terms of office? After Harsha's office expired by virtue of the act of July 31, in order to reinvest himself therewith it became necessary for him to requalify by taking the oath prescribed by the statute. If Harsha's original oath is sufficient to qualify him for a second employment, then it may as well be said that it is unnecessary for a Congressman, district attorney, or marshal to make a new oath upon his reelection or reappointment.

In Throop on Public Officers, section 175, it is said that "an officer who has failed to take the official oath, as required by the statute, before entering upon the duties of his office, can not have the salary attached to

the office," citing *Thomas* v. *Owens* (4 Md., 189); *Philadelphia* v. *Given* (60 Penn. St., 136).

As sustaining this principle see also *Williams* v. *United States* (23 C. Cls. R., 46).

The constitution of Maryland provides that every person elected or appointed to any office under it shall take the oath therein prescribed before he shall enter upon the duties of such office. In the case of *Thomas* v. *Owens* (4 Md., 189), the court held, with reference to an officer who failed to take such oath:

> After his election and commission by the governor he had the right to invest himself with the powers and entitle himself to the salary by qualifying in the manner pointed out by the constitution; but until he actually did qualify he was no more comptroller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibilities of the office (p. 220).

D.

Appellee not only failed to take the statutory oath, but he also failed to give a new bond, as required by section 3, 1 Supplement Revised Statutes, 65, which provides:

> That the clerks of the Supreme Court and the circuit and district courts, respectively, shall each, before he enters upon the execution of his office, give bond with sufficient sureties. * * *

Harsha ceased to have office as clerk of the circuit court of the United States after July 31, and the obligations of the bond ceased with the settlement of his accounts for the term of office for which given. For every reappointment or new office a new bond would

necessarily be required. Under no condition, without requalifying, can the old sureties be held responsible under the new appointment. In the case of *Williams* v. *United States* (23 C. Cls. R., 46) the claimant was duly nominated as consul-general to Haiti and took the oath of office, but failed to give the necessary bond as a condition precedent to entering upon the duties of the office. The principle that the bond is an essential thing to qualify for office is the same in that case as in the case at bar, and in dismissing it the court say:

> In our opinion, claimant was never fully invested with the office of minister resident and consul-general to Haiti. To use a familiar expression, he failed to qualify for the office, and is therefore not entitled to the salary (p. 53).

In the *City of Philadelphia* v. *Given* (60 Pa. St., 136), it appears that the defendant was returned by the judges of election in October, 1865, as elected city commissioner of Philadelphia for a term of three years from January 1, 1866. By an act of the general assembly it was provided that city commissioners, before entering upon the duties of their office, should give a bond to be provided, etc., but Given failed to execute and deliver such bond. The court held:

> The performance of the duties of the officer before giving the security was prohibited by law. The law must therefore refuse to aid him in compelling payment for services thus rendered against its directions. Citing *Commonwealth* v. *Slifer* (1 Casey, 23).

In the case of *Winneshiek County* v. *Maynard et al.* (44 Iowa, 15), the court held:

> The obligation of a surety is, however, *strictissimi juris*. He can not be held liable upon a contract on

> the plea that it is substantially the same or less onerous. This proposition admits of no controversy.
>
> * * * * *
>
> If Maynard had qualified in pursuance of his election and resigned, it would hardly be claimed that the bond could be tided over a vacancy and revived under an appointment.
>
> On the occurrence of the vacancy, then the sureties had a right to assume that they were no longer liable, and although Maynard was afterwards appointed, they had a right to assume that they had no occasion to examine his accounts while in office or take measures to protect themselves against his defalcations after his office had expired.

In *United States* v. *Nicholl* (12 Wheat., 505, 509) it was held that the sureties were not responsible on their official bond for moneys received by their principal as navy agent after the legal termination of his office. In line with the foregoing is the case of *Bryan* v. *United States* (1 Blatch., 141, 149), wherein the court held that in order to hold the sureties on an officer's bond it must appear that the moneys came in the principal's hands, either in point of fact or in judgment of law, previous to the time when the term of office expired.

This court in *United States* v. *Le Baron* (19 How., 73, 78), held:

> When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall

> enter on the possession of the office under his appointment. These acts, then, become conditions precedent to the complete investiture of the office.

This was followed by the case of *Dainese* v. *United States* (15 C. Cls. R., 64).

Harsha having retired from the office of clerk by virtue of the act of July 31, as a condition precedent to his reentering upon the duties of the office it became necessary for him to give the bond as required under section 3 of the act of February 22, 1875 (1 Supp. R. S., 65), and having failed to do so, he was not, therefore, legally in office.

E.

Appointments of clerks of circuit courts is by law vested in the circuit judges of the respective circuits under section 3, 1 Supplement Revised Statutes, 639. Both by custom and the accepted law such appointments are made and should be made in writing.

The question as to the necessity of an appointment on the part of the appointing power in order to install into office is very thoroughly discussed in *People* v. *Murray et al.* (70 N. Y., 521). In that case, after citing *Marbury* v. *Madison* (1 Cranch, 137), the court said:

> It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the person having the power to make the appointment, to be proved by parole and liable to be forgotten, misunderstood, or misreported, subject to all the contingencies and infirmities which are incident

to verbal evidence or evidence by parole, so pregnant of mischief and misfortune as to have led to the enactment of the Statute of Frauds (p. 524).

* * * * *

But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally and without writing when permitted by the terms of the statute conferring the power. Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed (p. 525).

* * * * *

The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, evidenced by an open unequivocal act. Chief Justice Marshall, in *Marbury* v. *Madison* (*supra*), says: "Some point of time must be taken when the power of the Executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission." It is not discretionary with a person having the power to appoint to office whether there shall be a commission. The signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office (p. 526).

F.

The principle that salary and fees are incident to the title to an office and that a de facto officer can not recover has become well settled. The principle is sustained in the following, as well as many other authorities:

2 Kent's Com., 295.
Riddle v. *County of Bedford*, 7 Serg. & R., 386.
Bowman v. *State Treasurer*, 25 Pa., 23.
Philadelphia v. *Given*, 60 Pa., 136.
Dorsey v. *Smyth*, 28 Cal., 21.
People v. *Potter*, 63 Cal., 127.
Matthews v. *Supervisors*, 53 Miss., 715.
Bennett v. *United States*, 19 C. Cls., 379.
Dainese v. *United States*, 15 C. Cls., 64.
Dolliver v. *Parks*, 136 Mass., 499.
Mechem on Public Officers, section 331.
Throop on Public Officers, section 661.

In *Bennett* v. *United States* (19 C. Cls. R., 379, 386) the court, in adhering to the decisions in the cases of *Kilburn* (15 C. Cls. R., 47); *Collins* (15 id., 34); *Burchard* (19 id., 137), and *Young* (19 ib., 145), held that neither the President alone, nor the President with the advice and consent of the Senate, can give a retroactive effect to the appointment of an officer by antedating the appointment, so as to entitle him to the emoluments of the office, prior to the time of his actual appointment, except where such a course is expressly authorized by law. They further hold upon the question of the right of the claimant to recover pay for the period in which he was to all intents and purposes a de facto officer, that the Treasury Department having paid such officer without

considering his title to the office de jure, that "had he sued for his pay it would have been necessary for him to show a good title to the office the salary of which he claimed."

In the case of *Dainese* v. *United States* (15 C. Cls. R., 64, 79) the Court of Claims held that a consul or vice-consul having failed to give the bond required by law, "he was not invested with either office so as to entitle him to recover any salary which may have been attached to it, even if motives of public policy should induce an executive department or a court to give validity to his official acts."

In *Mimmack* v. *United States* (97 U. S., 426) this court held that notwithstanding the fact that the President had revoked his acceptance of an officer's resignation, such revocation did not operate to restore such officer to the service, and that he could not recover compensation for the period after such revocation.

It is respectfully submitted that the third question presented by the circuit court of appeals should also be answered in the affirmative.

L. A. PRADT,
Assistant Attorney-General.
E. C. BRANDENBURG.